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No. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), *et al.*,
Petitioners,

v.

PAUL E. SCOTT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
I. RESPONDENTS HAVE NOT BEEN DEPRIVED OF ANY RIGHT ACTIONABLE UNDER 42 U.S.C. § 1985(3)	1
II. RESPONDENTS' DESCRIPTION OF THE LEGISLATIVE MATERIALS IS WHOLLY MISLEADING	6
"Privileges And Immunities" (Resp. Br. 35-39)	6
"Equal Protection" (Resp. Br. 39-41)	10
"Associational Rights In A Commercial Context" (Resp. Br. 42-44)	11
The Upshot	18
III. RESPONDENT CROSS CO. IS NOT ENTITLED TO RELIEF UNDER 42 U.S.C. § 1985(3)	19
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Adickes v. S.H. Kress & Co., 398 U.S. 144 20
Associated General Contractors of California v. California State Council of Carpenters, —— U.S. ——, 51 L.W. 4139 (February 22, 1983) 19
Barrows v. Jackson, 346 U.S. 249 20
Briscoe v. Lahue, —— U.S. ——, 51 L.W. 4247 (March 7, 1983) 18, 20
Communications Assn. v. Douds, 339 U.S. 382 3
Dombrowski v. Dowling, 459 F.2d 190 (C.A. 7) 1, 2
Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 3
Great American Fed. S. & L. Assn. v. Novotny, 442 U.S. 368 ..... 1, 2, 3, 20
Griffin v. Breckenridge, 403 U.S. 88 ..... 1, 2, 4, 5
Jackson v. Metropolitan Edison Co., 419 U.S. 345 .. 3
Kush v. Rutledge, —— U.S. ——, 51 L.W. 4356 (April 4, 1983) 9
Lugar v. Edmondson Oil Co., —— U.S. ——, 50 L.W. 4850 (June 25, 1982) 3
Marsh v. Alabama, 326 U.S. 501 3
Smith v. Arkansas State & Highway Employees, 441 U.S. 463 4
Steelworkers v. Sadlowski, —— U.S. ——, 50 L.W. 4626 (June 14, 1982) 3
Steelworkers v. Weber, 443 U.S. 193 3
Sullivan v. Little Hunting Park, 396 U.S. 229 20

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Fourteenth Amendment ..... *passim*
42 U.S.C. § 1985(3) ..... *passim*

MISCELLANEOUS:

Cong. Globe, 41st Cong., 2d Sess. (1870) 7
Cong. Globe, 42nd Cong., 1st Sess. (1871) ..... *passim*

REPLY BRIEF FOR PETITIONERS

I. RESPONDENTS HAVE NOT BEEN DEPRIVED OF ANY RIGHT ACTIONABLE UNDER 42 U.S.C. § 1985(3).

A. We, of course, agree with respondents that *Griffin v. Breckenridge*, 403 U.S. 88, the leading modern case interpreting 42 U.S.C. § 1985(3) was correctly decided.[1] (Resp. Br. 9-11.)[2] Respondents err fundamentally, however, when they assert that "*Griffin* Does Not Support Petitioners' Assertion of a State Action Requirement." (Resp. Br. 11, Heading.) The correct reading of *Griffin* in this respect is that of Justice Stevens concurring in *Great American Fed. S. & L. Assn. v. Novotny*, 442 U.S. 368, 381-385 (*Novotny*), and in *Dombrowski v. Dowling*, 459 F.2d 190 (C.A. 7) (*Dombrowski*). (See Pet. Br. 38-39 and 43-44.)

Respondents attempt to escape the force of those opinions by asserting: "These decisions involved allegations falling within *Griffin's* element (4b)—deprivation of a 'right or privilege of a citizen of the United States.'" (Resp. Br. 20.) This argument overlooks *Dombrowski's* pervasive discussion of "discrimination" and "equal protection of the law," which are at the heart of elements (2a) and (2b) as described in *Griffin*, but are not part of element (4b), to which respondents would confine the

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[1] We agree too that the coverage of § 1985(3) and the constitutionality of its application are separate questions. We hasten to add that since the purpose of § 1985(3) is to provide a federal cause of action enforcing the Reconstruction Amendments as the legislation's sponsors understood those Amendments (see, *e.g.*, Rep. Garfield's speech quoted at Pet. Br. 20-26) the statute cannot properly be given a scope beyond those Amendments. (See the principal dissent below, App. A-47 to A-48).

[2] Resp. Br. will refer to the Brief for Respondents herein; Pet. Br. will refer to the Brief for Petitioners; App. will refer to the separately bound Appendix to the Petition for Writ of Certiorari herein, which reproduces the opinions below.

Dombrowski decision.[3] Moreover, after noting that because "plaintiff is white and claims no abridgement of his constitutional right to travel, the holding of *Griffin* does not control this case" (459 F.2d at 195), the *Dombrowski* opinion observed that the *Griffin* Court:

> expressly noted that it was not deciding "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under § 1985(3)." Thus, the Court did not have occasion to consider the effect of the statute on private conspiracies designed to deprive the plaintiff of rights protected by the Fourteenth Amendment. [459 F.2d at 195, quoting 403 U.S. at 102, which discussed the motivational element (2a) and (2b) delineated in *Griffin*.]

There is a further conclusive objection to respondents' interpretation of *Dombrowski*. If, as they say, Mr. Dombrowski's § 1985(3) case failed because of noncompliance with *Griffin's* element (4b), the Seventh Circuit would have had to face the issue whether the denial to the plaintiff of an opportunity to rent an office constituted an injury to his person or property within element (4a). This question was not reached because due to the absence of state action (and of a constitutional right, like that in *Griffin*, which directly protects private persons), no violation of element (2a) or (2b) had been established.

Respondents themselves recognize that if *Griffin's* elements (1)-(3) are satisfied the plaintiff prevails if either element (4a) or (4b) is satisfied. It is on this basis that they attempt to put aside *Novotny*, asserting that "the plaintiff in *Novotny* suffered no injury to person or property that would bring this section 1985(3) action within (4b)." (Resp. Br. 21). But this assertion is untenable because the harm suffered by Mr. Novotny was termination from his job, clearly an injury to his property. (See

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[3] See, *e.g.*, 459 F.2d at 191 stating the issue under § 1985(3); *id.* at 192-193, describing the holding of the district court which was being reviewed; and *id.* at 196 stating the critical conclusion.

442 U.S. at 368-370; see also *id.* at 385 (Stevens, J., concurring).) Therefore, the claim in *Novotny*, too, failed because no illegal "purpose" within *Griffin's* elements (2a) or (2b) had been established, rather than as respondents argue, because no element (4b) injury had been shown.

B. It is objected at Resp. Br. 11 that we do not explain "precisely what form of state involvement is required". Such a discussion would have been an entirely academic commentary on an issue which has frequently divided the Court since respondents have demonstrated no state involvement of any kind.[4] That being so, plaintiffs' claim of illegal interference with their constitutional freedom of association founders on the principle that "most rights secured by the Constitution are protected only against infringement by governments" (*Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156; *Lugar v. Edmonson Oil Co.*, —— U.S. ——, 50 L.W. 4850, 4853 (June 25, 1982).)[5]

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[4] *Amicus Curiae* Legal Foundation of America (LFA) attempts to overcome this fatal deficiency in the plaintiffs' claim by (a) comparing this case to *Marsh v. Alabama*, 326 U.S. 501 and (b) asserting that any union action is state action. As to the latter point, LFA has overlooked not only the squarely contrary holding of *Steelworkers v. Sadlowski*, —— U.S. ——, 50 L.W. 4626, 4631, n. 16 (June 14, 1982); and *Steelworkers v. Weber*, 443 U.S. 193, 200 (see also *Communications Assn. v. Douds*, 339 U.S. 382, 402), but also the requirement of a nexus between the state and the conduct of the private entity which is sought to be treated as the state. (See, *e.g.*, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-351.) As for *Marsh*, while the title to the town of Chickasaw Alabama was held by a private corporation whose employee was the town policeman (see 326 U.S. at 502), neither the defendant unions nor all the unions together exercised governmental authority in Port Arthur, Texas. LFA Br. 17 and Resp. Br. 28, n. 11, refer to testimony given at an *ex parte* hearing. That testimony does refer to the difficulty of controlling individual acts of violence *"away from the job site"* but does not suggest that the law enforcement authorities were unable to deal with the violence which was the subject of the present lawsuit. In fact, some of the perpetrators of that violence were apprehended, tried, convicted and imprisoned.

[5] Contrary to LFA's understanding (LFA Br. 8-9) the state action requirement depends on the constitutional source of the right

C. The absence of state action aside, plaintiffs have not established a denial of "equal privileges and immunities under the laws" because they have not established a violation of their First and Fourteenth Amendment rights. It bears reiteration that many of those at the job site were union members and that most resided in the immediate area or in nearby Beaumont or Houston. (See the Appendix to this Brief at pp. 1a to 2a). Thus, the First Amendment claim here depends on the *en banc* court of appeals majority's theory that "merely working for a nonunion employer [does] qualify for constitutional protection." (App. A-12). We demonstrated to the contrary at Pet. Br. 44-47 with special reliance on *Smith v. Arkansas State & Highway Employees*, 441 U.S. 463.

In attempting to distinguish *Smith*, respondents confuse the nature of the right asserted with the means of depriving the plaintiff of that right.[6] The latter is simply not relevant for determining whether a right is protected by the First Amendment.[7] And while respondents assert that the "actual relevance of the *Smith* opinion to this case lies in its recognition that first amendment associational rights would be impaired by efforts to hinder

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asserted, rather than on its importance. Thus, as the Court said of a cognate First and Fourteenth Amendment right: "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." (*Hudgens v. NLRB*, 424 U.S. 507, 513). So, too, the rights of "commercial association" (Chamber of Commerce Br. 23) and "to earn and pursue a livelihood and to enter into and conform contracts * * *" (National Right to Work, etc. Br. p. 7) are, to the extent that they have any constitutional basis, also subject to the state action principle, as the very cases cited *id.* illustrate.

[6] "That the defendant did not violate plaintiffs' first amendment rights in *Smith* by simply ignoring plaintiffs is hardly relevant to the situation of mob violence in the present case." (Resp. Br. 24-25).

[7] The *means* of deprivation (that is the defendants' *conduct*, as opposed to the defendants' "purpose") are relevant under § 1985(3) only with respect to the first element of a claim which is not at issue here. (See *Griffin*, 403 U.S. at 102-103.)

workers from 'joining together in a union, or from persuading others to do so, or from advocating any particular ideas'" (Resp. Br. 25, quoting 441 U.S. at 465), that argument is unavailing because respondents have failed to prove the existence of such "efforts."

D. *Griffin* left open the question "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us". (403 U.S. at 102 n.9.) Respondents contribute nothing to the answer to that question. In their discussion of "Motivation-Element (2)" (Resp. Br. 15-19) it is stated that "the necessary motivation is present when the animus behind the conspiractors' actions is ir[illegible]us and discriminatory" (*id.* at 15) and that the "equal protection moiety of § 1985(3) * * * becomes operational when violence is directed against persons because of their perceived membership in a group" (*id.* at 17). Aside from these remarks that discussion does not even purport to specify the content of, or any limitation on, the class-based animus concept.

Respondents do further elaborate their view of the class-based animus concept at pp. 26-31 of their brief. That discussion proceeds from the premise that "[a]ny class is appropriate so long as plaintiffs can prove the requisite invidiously discriminatory animus." (Resp. Br. at 26.) Respondents then quote approvingly the statement of the *en banc* court of appeals majority, "those who would exercise a false territorial sovereignty by formenting hostility against persons antagonistic to their aims *create a class* in need of federal protection of precisely the sort Congress intended to protect." (Resp. Br. at 26-27; respondents' emphasis.) Except where the conspiracy is entirely mindless, tortious actions taken against a group of persons always "create a class" in this sense of that term—the class of those at whom the tort is aimed. In practical terms then, respondents and the *en banc* court of appeals majority *do* read § 1985(3) as creating a general federal

tort law. (See the principal dissent below, A-44 to A-45, A-48 to A-49.)

II. RESPONDENTS' DESCRIPTION OF THE LEGISLATIVE MATERIALS IS WHOLLY MISLEADING.

Respondents' analysis of the legislative history (Resp. Br. 35-44) is, as we understand that analysis, designed to prove: (A) that the debates on the 1871 Act are grounded on a distinction between "equal protection of the laws" as to which the necessity of requiring a state action showing was controversial and "equal privileges and immunities" as to which it is said all agreed that no state action showing is required (Resp. Br. 35); and (B) that "Associational Rights In A Commercial Context Were Close To The Core Of The Coverage Of [§ 1985(3)] Intended By Congress" (Resp. Br. 42; Heading). We show now that the very legislative materials cited by respondents belie rather than support each of respondents' contentions.

"Privileges And Immunities" (Resp. Br. 35-39.)

1. Respondents make much of the fact that Rep. Garfield quoted from Section 6 of the Enforcement Act of May 21, 1870 during the debate on the 1871 Act and that Rep. Garfield had supported the 1870 Enforcement Act. Respondents are not the first to have raised this point, Rep. Shellabarger raised the same objection (Cong. Globe, 42d Cong., 1st Sess. App. 153-154 (1871) (hereinafter "Globe")), and Rep. Garfield responded:

> If the case stands in all respects exactly as my colleague puts it, it might push me to the conclusion that some of the provisions of the enforcement act are unconstitutional; * * *.
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> * * * *
>
> But I call my colleague's attention to the peculiar language of the fifteenth amendment. It is not, as his remarks imply, a mere prohibition to the State, a simple negation of power. It is a double prohibition, reaching, in terms, both the State and the United States. * * *

This double prohibition Congress may enforce. [Globe App. 154.]

This was the same point made by Sen. Pool in introducing § 6 of the 1870 Enforcement Act:

> The fifteenth amendment to the Constitution of the United States provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color, or previous condition of servitude. . . . But the word "deny" is used. There are various ways in which a State may prevent the full operation of this constitutional amendment. It cannot—because the courts would prevent it—by positive legislation, but by acts of omission it may practically deny the right. *The legislation of Congress must be to supply acts of omission on the part of the States.* If a State shall not enforce its laws by which private individuals shall be prevented by force from contravening the rights of the citizen under the amendment, it is in my judgment the duty of the United States Government to supply that omission, and by its own laws and by its own courts to go into the States for the purpose of giving the amendment vitality there.
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> There [in the fourteenth amendment] the word "deny" is used again; it is used in contradistinction to the first clause, which says, "No State shall make or enforce any law" which shall do so and so. That would be a positive act which would contravene the right of a citizen; but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. *It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights.* [Cong. Globe, 41st Cong. 2d Sess., p. 3611 (1870); emphasis added.]

2. Rep. Wilson's discussion of privileges and immunities occurs in the portion of his remarks concerning § 1

of the 1871 Act—the provision dealing with conduct under color of state law—and hence is entirely irrelevant in determining the meaning of § 2. (See Globe 481-482.)

3. We agree that Sen. Frelinghuysen's comments, cited by respondents, warrant close scrutiny, for he said of the Fourteenth Amendment:

> This amendment specifies life, liberty, and property as among the privileges of the citizen of the United States, and provides "that no State shall deny to any person within its jurisdiction the equal protection of the laws." A State denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A State denies protection as effectually by not executing as by not making laws. *The amendment says a State is not to abridge the privileges and immunities by making or enforcing any laws, and it is denying protection by failing to make or by failing to enforce proper laws.*
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> * * * *
>
> The Federal Government should only interfere to protect the citizen of the United States in his privileges when the State clearly and persistently fails to do so. [Globe 501; emphasis added.]

4. Respondents cite as background the "sentiments of [Sen.] Pratt" expressed in a speech immediately following Sen. Frelinghuysen's. In that speech Sen. Pratt said:

> We cannot reach by law the grand jury which refuses to indict these criminals, nor can we punish the petit jury which refuses to convict. *The State officers, the constables and sheriffs, who refuse to do their duty are beyond our reach.* We cannot touch any State official for malfeasance, or misfeasance, or non-feasance; *but we can say to all these unprofitable servants, to all the civil agencies in the States, "Your failure is our occasion and opportunity. We will describe and punish as crimes against the United States that class of offenses*

> *against citizenship which you fail to punish.* If in doing this we seem to invade the reserved rights of the States in punishing riots, arsons, robberies, and murders committed in your midst by organized bands of ruffians, it is because they have been committed against citizens of the United States *in violation of rights secured by the national Constitution*, and because you wholly fail to prevent and punish them. You have brought this necessity upon yourselves by refusing to obey a plain constitutional duty not to withhold from any one the equal protection of your laws. You have omitted this duty habitually where the friends of the Government were concerned. The record of a conviction does not exist in your midst where you have punished a member of this order of outlaws. [Globe 506, emphasis added.]

5. Rep. Cook, say respondents, provided "[p]erhaps the clearest exposition" on priviliges and immunities. After the passage already quoted at Pet. Br. 28 Rep. Cook went on to give three examples of interference with federal rights that could be redressed by federal law: interference with certification of a case to the Supreme Court of the United States to prevent assertion of a federal constitutional right, interference with federal elections, and interference with proceedings in a federal court. (Globe 486.) However, as this Court has recently explained, the 1871 Act treats very differently the sort of activity described by Rep. Cook and the sort of activity that falls within the sections of the Act under consideration in this case. (See *Kush* v. *Rutledge*, —— U.S. ——, 51 L.W. 4356, 4358 (April 4, 1983).)

While, to borrow the *Kush* opinion's words, Rep. Cook believed that Congress had authority to legislate with respect to "activity that is * * * institutionally linked to federal interests," he did not believe that Congress had authority to reach activity, "that is usually of primary state concern," unless the states were unwilling or un-

able to protect those rights. (See Globe 485 (dialogue with Rep. Eldridge) quoted Pet. Br. 28-29 n.5.)

6. The last paragraph of this section of respondents' argument contains scattered references to ten different speeches, but when those speeches are examined, it is seen that even the radical Republicans among those cited by respondents did not speak in terms broad enough to aid respondents. For example, Rep. Butler, on the page cited by respondents, like Rep. Garfield, grounded the 1871 Act in the failure of the southern states to afford protection for constitutional rights:

> All agree that the mere constitutional assertion of affirmative guarantees not made operative by law, are ineffectual to aid the citizen. How, then, can the citizen avail himself of those constitutional guarantees and affirmative declarations of his rights, if Congress cannot pass laws to make them operative? How can it be an interference with the rights of the States for the laws of the United States to afford that protection to its citizens which the State fails or neglects to do for itself? [Globe 448).][8]

"Equal Protection" (Resp. Br. 39-41.)

1. Respondents' equal protection discussion begins from the proposition that the moderate Republicans held a wide range of views as to what constitutes a denial of equal protection. In support of this assertion, respond-

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[8] Rep. Lowe, another sponsor of § 2 as originally drafted, spoke to the same effect on the pages cited by respondents. (Globe 375.) So did Rep. Monroe. (Globe 370.) We have already discussed the views of Representatives Wilson and Cook and Senators Pratt and Frelinghuysen, showing that their views were the same as those held by Rep. Garfield. Sen. Edmunds read the privileges and immunities clause as "a direct prohibition to the State" (Globe 696), and the equal protection clause as allowing federal protection where the states have failed to give equal protection (Globe 697). Rep. Bingham's views of the scope of the Fourteenth Amendment were expressly disapproved by Rep. Garfield (Globe App. 151) and cannot be deemed authoritative. Rep. Kerr was a Democratic opponent of the bill. (Globe App. 46-50.)

ents cite speeches by Representatives Coburn, Beatty, Wilson, and Hoar and by Senator Frelinghuysen. But all of these Republicans agreed with Rep. Garfield's views quoted at Pet. Br. 25 that the justification for § 2 of the 1871 Act is that a state denies equal protection of the laws by failing or refusing to enforce those laws. Rep. Blair, also cited by respondents, was not a moderate Republican and was an opponent of the 1871 Act.

2. Respondents characterize speeches by Representatives Mercur and Perry as arguing that for equal protection purposes the "state" includes the general community. However, both of these Representatives made it clear that they were speaking of the "people, in the administration of their government, act[ing] mostly through the legislative, judicial and executive branches of their creation," (Globe App. 182, Rep. Mercur), and "the people of a State, with more or less definite political and governmental relations," (Globe App. 80, Rep. Perry). They were discussing the community organized into a governmental body, and not, as respondents would imply, some informal social group.

3. Respondents conclude by citing two speeches given before Rep. Garfield raised his objections to § 2 as introduced and before the compromise amendment to § 2 was accepted. Neither of the speeches supports, or even pertains to, the point made by respondents.

"Associational Rights In A Commercial Context" (Resp. Br. 42-44.)

Respondents assert that, "The Republicans in need of congressional protection fell into two general classes: blacks and northern white immigrants. As a result, two subsidiary types of animus were considered by Congress: race and economic animus." (Resp. Br. 42.)

(a) To show that the assertion that the 1871 Act is aimed at conspiracies motivated by "economic animus" is wrong, we need go no further than the passages from the legislative history cited by respondents.

1. Respondents rely primarily on statements by three northern Congressmen and by one northern Senator, all *Democratic opponents of the bill*, to the effect that the real issue in the South was not race but rather domination of the South by northern carpetbaggers.

2. Rep. Wilson, on the page cited by respondents, had this to say:

> What is the purpose of murdering poor and defenseless negroes? *Is it for gain or "the base aims of individual offenders?" No.* What is the purpose of driving officers from their places? Is it for gain or the "base aims of individual offenders?" No. It is to get rid of votes, to get possession of local and State governments. [Globe 484; emphasis added.]

3. Rep. Tyner, also on the page cited by respondents, more directly refuted the Democrats' argument:

> No matter, sir, how generous and magnanimous the terms on which they were restored to citizenship, they are rebellious still in spirit only because they are compelled *to become the political equals of those who were formerly their slaves.* It is not in denying to certain of the leaders of the late rebellion the right to hold office, but in the extension of political privileges to colored men, whereby power has departed from its former possessors, that we find an intelligent explanation of their conduct now. *Rescind the last three great amendments to the Constitution and thus revive slavery and the domination of the slave power, and no voice of complaint will come to us from the men whose lawless acts require suppression by the power of the General Government.* [Globe 487; emphasis added.]

4. Rep. Roberts gave the example of a native southerner and officeholder of long term in South Carolina who suffered violence at the hands of the Klan, and after noting that blacks and northerners were not the only victims of violence, stated:

> But one rule never fails: the victims whose property is destroyed, whose persons are mutilated,

> whose lives are sacrificed, are always Republicans. They may be black or white; they include those who wore the blue and those who wore the gray; newcomers and life-long residents, but only Republicans. *Stain the door lintels with the mark of opposition to reconstruction and of hostility to the national Administration, and the destroying angel passes by.* [Globe 413; emphasis added.]

5. Sen. Pratt explained that the Klan violence was rooted in the Civil War and in the resentment of the former slaveowners over the emancipation of their former slaves.

> Mr. President, these acts are the development of the rebel spirit still alive in the South. They are the outcroppings of that hate which sought to destroy the Union; which laid hold of the pillars of State and sought to pull down the political fabric. Conquered upon the field, the defeated rebels and their sons still wage war against the friends of the Government under a new system of tactics, which paralyzes law, and which must drive them into exile or into the surrender of their opinions and to fellowship with the Democratic party. [Globe 504.]

In short, each of the speeches cited by respondents actually supports our original submission—that "[t]he point of the 1871 Act was to provide redress for the victims of the contemporaneous conspiratorial activities of the Ku Klux Klan: the Freedmen and those who made common cause with the Freedmen" (Pet. Br. 41).

(b) Respondents' attempt to show that the 1871 Act is aimed at conspiracies motivated by an animus against "immigrants" from other areas is equally flawed.

1. Respondents quote part of a sentence by Sen. Osborn as evidence that the bill's proponents stressed the need to protect, "men who have gone to the south" in "pursuit of their proper vocations." (Resp. Br. 43.) The entire passage reads as follows:

> My associates on this floor from the more northern States have no adequate appreciation of the circumstances under which loyal men in many parts of the South are living. Men who passed through our late war fearlessly meeting an open, avowed enemy, men who have gone to the South from other States in the lawful and harmless pursuit of their proper vocations, industrious emigrants from the european States, *white men who were born at the South and whose fathers and grandfathers were born before them, colored men who have received but cannot peacefully enjoy the rights of citizens of this Republic—all men, irrespective of race, origin, or color, so soon as they presume, in exercise of the rights guaranteed them in the Federal Constitution, to vote or hold an office contrary to the opinion of a political party, are continually in imminent peril* for property, person, and life, and are denied equal justice in the courts. [Globe 653-654; emphasis added.]

2. The very passage quoted from Sen. Ames shows that he found the hostility to "carpetbaggers" to be based on their opposition to slavery. (Globe 569-570.)

3. The passage excerpted from a speech by Rep. Kelly makes it appear as though he thought one of the Klan's purposes to be to drive out northern capital and enterprise. However, Rep. Kelly's point becomes clearer when the next sentence in the paragraph is set forth:

> I ask gentlemen on the other side of the House whether the proposition is true, as to any considerable part of the South, that a northern man can take his capital, his family, and his skilled workmen with him, and, having established himself quietly, identify himself with the Republican party, and still live undisturbed and unharmed. [Globe 338.]

(c) Following their series of carefully selected excerpts, respondents conclude with two sets of citations to the debates intended to support two slightly different points.

First, respondents assert that some legislators tried to convince their southern colleagues that it would be to the South's advantage to protect "carpetbaggers" who would provide the region with capital and labor. Respondents cite Sen. Morton's speech given before the Senate took up the House-passed bill (H.R. 320). Sen. Morton did note that the reign of terror in the South deprived that region of capital and immigration but the point of his speech was that it was blacks and white Republicans who were denied protection (see Globe App. 251-252.)

Sen. Pool stated that peace was needed so that through industry the Nation could repair its losses from the war. But he said this only to warn that if the Klan violence and its evasion of state authority did not stop more extreme measures would have to be taken against the South. (Globe 609.) And earlier in the speech cited by respondents, Sen. Pool made clear that he did not believe that it was the fact of immigration that drew the Klan's ire:

> The truth is that whenever a northern man, who goes into a southern State, will prove a traitor to the principles which he entertained at home, when he will lend himself to the purposes of the Democracy or be purchased by them, they forget that he is a carpet-bagger and are ready to use him and elevate him to any office within their gift. [Globe 607.]

Second, respondents' statement that a "prime concern in the legislative debates was the protection of the right of 'outsiders' to migrate to southern states and do business," (Resp. Br. 44) purports to have a basis in a speech by Rep. Sheldon early in the House debate and a speech by Sen. Frelinghuysen before the Senate took up H.R. 320.

Rep. Sheldon noted the possibility of local prejudices, but he certainly did not understand these prejudices to be directed particularly against "outsiders", and he explained the violence on the South not as rooted in sectional prejudice but as follows:

> The white people of the South are most strongly prejudiced against the colored people. Not so much, however, against them for their color as for their previous condition. *The sudden and radical change which has made the slave a coequal citizen* does not commend itself so readily to the mind of the former slaveholder as to those of us who were reared and educated under other circumstances. [Globe 369; emphasis added.]

(d) Respondents characterize a reference by Sen. Frelinghuysen's to craft workers as "interesting" (Resp. Br. 44 n.20) and the Chamber of Commerce (at pp. 13-14 of its brief) quotes the same passage as evidence of an intent to protect northern workers. The court of appeals in this case rejected the argument that this passage evidenced a general intent to protect northern labor because the passage is an isolated reference to such an intent and because the hostility directed toward northerners was understood to be due to Reconstruction policies. (App. A-17 n.11.) In fact, the passage is not even an isolated statement of concern for northern labor as such; when placed in the context of the entire speech it is clear that Sen. Frelinghuysen was denouncing the doctrine of states' rights that previously had allowed the southern states to oppress free black workers from the north when they happened into southern territory. To place this statement in context, it is important to first consider the sentences that begin the paragraph in which the cited passage appears:

> And this is not all. The forty millions are not only by this amendment citizens of the United States, but are by virtue of it, and of it alone, and despite the laws or constitution of any State, also citizens of the State in which they reside. National and State citizenship now both depend on the Constitution of the United States; formerly both were dependent on the States. [Globe 500.]

It was because of the Fourteenth Amendment that the "journeyman cobbler of New England" could stand in

Charleston and other southern ports and declare, "Here I will settle in despite of the constitution and of the laws of these States; * * *." And when the following passage spoken just before that quoted by respondents, is considered, it is clear that the northern laborers who gained most by the Fourteenth Amendment were black northern laborers who prior to the Amendment were oppressed when they traveled to the South, not because they were *outsiders* but because they were *black*:

> It was, unquestionably, the right of a sovereign State to determine citizenship, and that authority determined against the citizenship of its inhabitant, and he had that character nowhere. The Supreme Court went so far as to declare, in the case of Scott *vs.* Sanford, that one might have all the rights and privileges of a citizen of a State and yet not be entitled to the rights and privileges of a citizen of another State. A mulatto man might be a citizen of Massachusetts but he was not a citizen of Virginia; and we know that when citizens of Massachusetts went to South Carolina they were imprisoned, and when Judge Hoar went to argue their cause he was mobbed. We know that the Supreme Court of the United States declared that four millions of native-born persons who paid taxes and were represented were not citizens. We know that the extreme State-rights doctrine denied all national citizenship, that this doctrine, modified and accepted, made United States citizenship dependent on State citizenship. Now comes the fourteenth amendment, and declares that all persons, no matter whether they are citizens of States or not, born or naturalized in the United States, shall be citizens of the United States. That is what this nation says, let the States say what they will; and it further adds that they shall be citizens of the State in which they reside. [Globe 500.][9]

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[9] These three examples of persons who suffered under the doctrine of states' rights, which allowed the southern states to strip northern citizens of their rights, all involvd black men—Dred Scott,

Thus, rather than describing the effect of proposed legislation, and he was not discussing the 1871 Act, Sen. Frelinghuysen was describing the effect of the Fourteenth Amendment and its destruction of the states rights doctrine which had justified southern oppression of even free northern blacks. This is a far cry from exhibiting an intent to protect northern labor through legislation, much less a showing of a "prime concern."

The Upshot.

In sum the legislative history cited by respondents in fact leads to the same conclusions this Court drew from the entire legislative history just last month:

> The Ku Klux Act, 17 Stat. 13, was enacted on April 20, 1871, less than a month after President Grant sent a dramatic message to Congress describing the breakdown of law and order in the Southern states. Cong. Globe, 42d Cong., 1st Sess. 236, 244 (1871). During the debates, supporters of the bill repeatedly described the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern states.
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> * * * *
>
> It is clear from the legislative debates that, in the view of the Act's sponsors, the victims of Klan outrages were deprived of "equal protection of the laws" if the perpetrators systematically went unpunished. Proponents of the measure repeatedly argued that, given the ineffectiveness of state law enforcement and the individual's federal right to "equal protection of the laws," an independent federal remedy was necessary and Congress had the power to provide it. See *Monroe* v. *Pape*, 365 U.S. 167, 174 (1961). [*Briscoe* v. *Lahue*, —— U.S. —— 51 L.W. 4247, 4250 (March 7, 1983).]

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a mulatto citizen of Massachusetts, and the citizens of Massachusetts who Judge Hoar was sent to defend in South Carolina. The last example involved the Port of Charleston's holding of free black seamen from Massachusetts as security while their ship was in port. (S. Hoar, Autobiography of Seventy Years, Vol. 1, 24 (1903).)

III. RESPONDENT CROSS CO. IS NOT ENTITLED TO RELIEF UNDER 42 U.S.C. § 1985(3).

Respondents assert that the "statutory language leaves no doubt that the judgment of the court [below] is correct" in holding that respondent Cross Co. is entitled to relief even though that company is not in the protected class. A decision of this Court subsequent to our brief (but prior to that of respondents) demonstrates the inadequacy of this literalistic approach to standing.

In *Associated General Contractors of California v. California State Council of Carpenters*, —— U.S. ——, 51 L.W. 4139 (February 22, 1983) ("*AGC*"), the Court held that the plaintiff unions were not entitled to recover damages under § 4 of the Clayton Act for injuries allegedly suffered by them as a result of the defendants' violation of the antitrust laws. The bases of the respective damage claims in *AGC* and in this case are parallel. In *AGC* the antitrust conspiracy injured both the contractors and the unions, and injuring the latter was its purpose. In the present case, plaintiffs argued that the defendants' conduct (which is arguably actionable under § 1985(3)) caused direct injury to the individual plaintiffs and to Cross, and that the object was to damage Cross as a nonunion employer. Thus, in both instances, there is no question that (assuming a violation) one class of plaintiffs had a cause of action—the union contractors in *AGC*, and the individual plaintiffs in this case. But even as the unions were denied standing in *AGC*, so Cross should be denied standing in this case. The pertinent statutory language in *AGC*, that of § 4 of the Clayton Act, is—as the Court recognized in *AGC*—without limitation on its face. Nevertheless, relying heavily on "the contemporary legal context in which Congress acted * * *" (described at 51 L.W. 4143) in adopting § 4's Sherman Act antecedent, the Court refused to read § 4 literally.

There is no basis for attributing to the earlier 1871 Congress a more expansive approach to standing than *AGC* attributed to the Sherman Act Congress. Indeed,

this Court has recently reaffirmed, in construing § 1 of the 1871 Act (42 U.S.C. § 1983): "that the all-encompassing language of § 1983, referring to '[e]very person' who, under color of law, deprives another of federal constitutional or statutory rights, is not to be taken literally." (*Briscoe v. Lahue, supra*, 51 L.W. at 4238.)[10] Since the precedents leave the question open, persons outside the protected class should be denied § 1985(3) standing by a parity of reasoning with *AGC* because the granting of relief to the members of a protected class alone is sufficient to deter violations of § 1985(3) without unnecessarily expanding federal tort law.[11]

CONCLUSION

The judgment of the court of appeals should be reversed with directions to remand this cause to the district court for dismissal of the complaint.

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[10] In asserting that "*Griffin* clearly establishes" the absence of "any special standing limitation" (Resp. Br. 33), plaintiffs again misread that precedent, since the petitioners who rode in the car with R. G. Grady were themselves in the protected class. Thus it was not necessary to decide whether persons outside the protected class had standing to sue under § 1985(3). (See also Pet. Br. 48 discussing Justice Stewart's opinion for the Court in *Novotny*.)

[11] Respondents' reliance on *Sullivan v. Little Hunting Park*, 396 U.S. 229 and *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, is plainly misplaced. In *Sullivan* the white plaintiff was given standing not under a construction of 42 U.S.C. § 1982, but on the theory that a denial of standing would unconstitutionally sanction the denial of a contract to the black plaintiff contrary to *Barrows v. Jackson*, 346 U.S. 249, 259. (See 396 U.S. at 237). No issue of standing was presented in *Adickes, supra*, because Ms. Adickes, a white, sued to vindicate her own rights: (i) to be served in the company of Negroes; and (ii) not to be falsely arrested. (See 398 U.S. 147-148, 149-150.)

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APPENDIX

(Excerpts From Trial Transcript)

A. *Testimony of Plaintiff Paul Scott*

Q: Where do you live?

A: I live at 717 Pecos Avenue in Port Arthur, Texas. [Tr. 25.]

• • • •

Q: All right, were some of the men, to your personal knowledge, did they actually belong to construction unions?

A: We never asked them, but to my personal knowledge, we had several union personnel, card-carriers, union people on our job working. [Tr. 33.]

• • • •

A: [There] was an editorial written by the Beaumont Enterprise stating that we were paying substandard wages, we were getting men from out-of-state to come in to do the job and this kind of a statement which was totally untrue, and we confronted the man and he apologized for it—for writing the editorial.

Q: When was the editorial in the paper?

A: Pardon?

Q: When was the editorial in the paper?

A: It was right after the incident. [Tr. 64.]

B. *Testimony of Plaintiff A.A. Cross*

Q: How did you go about engaging employees to work for you?

A: Our usual way, we made the information available to all our former employees, everybody in the area that we were looking for help. We advertised in all of the papers throughout the State, some out-of-state papers, we have a way of communicating to the industry that we are looking for help, we used that way.

Q: All right, and then did you man the job with carpenters, ironworkers and the like?

A: Yes, we did.

Q: All right, did you hire people from this locale?

A: Yes, we did.

Q: Did you inquire whether they belonged to Unions or did not belong to a Union?

A: No, I didn't. [Tr. 163-164.]

• • • •

Q: Is it true you were using personnel on the job—some of them were local and some of them were from out-of-state?

A: I really don't know where any of the personnel on the job were from.

Q: All right, did you make any particular effort to confine employment of persons on the job to local personnel or did you use anyone who came in?

A: I made no effort to confine it to local personnel or foreign personnel.

Q: Is it true that when you came into the area you brought personnel with you from out-of-state?

A: No, we didn't have any people from out-of-state.

Q: Well, from out of the County.

A: We brought some people from Houston. I don't know—

Q: Well, were you made aware at any time prior to this incident that there was some dissention in the community concerning your use of persons from outside the County?

A: No. [Tr. 201-202.]

Q: Well, did you read an editorial in the newspaper that concerned itself with that subject, about the use of out-of-County labor?

A: Yes, I did after the attack at our jobsite. [Tr. 201-202.]